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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 356

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

THE PILLIOD LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 20, 1929
CERTIORARI GRANTED OCTOBER 21, 1929

(34487)

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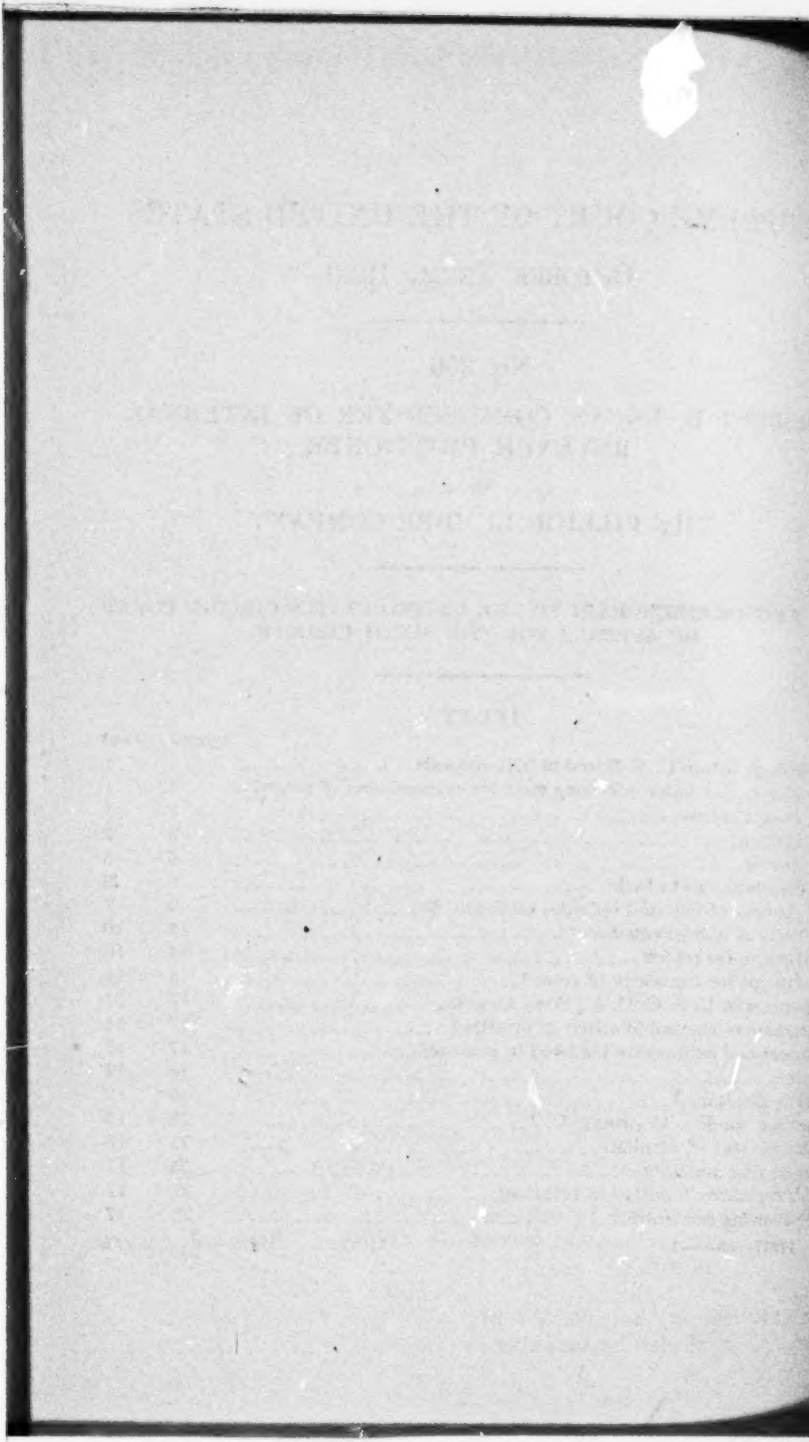
INDEX

	Original	Print
Proceedings before U. S. Board of Tax Appeals	1	1
Motion and order enlarging time for transmission of record	1	1
Docket entries	2	1
Petition	3	2
Answer	6	5
Stipulation as to facts	8	6
Findings of fact and opinion, Littleton, M	9	7
Order of redetermination	13	10
Petition for review	14	10
Precipe for transcript of record	15	11
Proceedings in U. S. C. C. A., Sixth Circuit	17	11
Appearance of counsel [omitted in printing]	17	11
Argument and submission [omitted in printing]	17	11
Decree	18	12
Opinion, Denison, J	19	12
Dissenting opinion, Moorman, C. J	23	15
Motion for stay of mandate	25	16
Order staying mandate	25	17
Clerk's certificate [omitted in printing]	27	17
Order allowing certiorari	28	17



1 Before United States Board of Tax Appeals, Washington

THE PILLIOD LUMBER COMPANY, PETITIONER
vs.
COMMISSIONER OF INTERNAL REVENUE
respondent
} Docket No. 10015

Motion and order enlarging time

Filed November 4, 1927

The Pilliod Lumber Company, the petitioner herein, respectfully shows that on September 7, 1927, it filed its petition for review by the United States Circuit Court of Appeals for the Sixth Circuit of the decision of the board theretofore rendered herein on July 8, 1927; that the time for the transmission and delivery to the clerk of said court of the record for review herein will expire on November 7, 1927, and that unless the time provided by the rules of said court be enlarged by a member of the board or a judge of the court it will be impossible to prepare, transmit, and deliver to the clerk of said court said record for review.

Wherefore, the petitioner moves that the board by a member thereof enlarge the time for transmission and delivery to the clerk of the United States Circuit Court of Appeals for the Sixth Circuit of the record for review by a further period of sixty days.

HERBERT W. NAUTS,
Counsel for Petitioner.

Time for transmission and delivery of record to the clerk of the Circuit Court of Appeals for the Sixth Circuit enlarged and extended to Nov. 26, 1927.

B. H. LITTLETON, *Member.*

[Certificate to foregoing paper omitted in printing.]

2 Before U. S. Board of Tax Appeals

Docket entries

1925
Dec. 16. Petition received and filed.
" 21. Copy of petition served on solicitor.
" 21. Notification of receipt mailed taxpayer.
1926
Jan. 16. Answer filed by solicitor.
" 19. Copy of answer served on taxpayer. Assigned general calendar.
1927
Jan. 14. Hearing date set 3-3-27.
Mar. 1. Brief filed by taxpayer.

Mar. 3. Hearing had before Mr. Korner. Stipulation filed. Submitted on pleadings. Assigned to Mr. Phillips.
" 31. Brief filed by G. C.
May 2. Transcript of hearing 3-3-27 filed.
July 8. Findings of fact & opinion rendered. Judgment will be entered for the comm'r. Both sides notified.
" 9. Order of redetermination signed & filed. Both sides notified.
Sept. 7. Petition for review to U. S. Cir. Ct. of Appeals, 6th Cir., with assignment of errors filed by taxpayer.
Nov. 4. Motion to extend time 60 days filed by taxpayer.
" 4. Designation of record filed by taxpayer.
" 5. Motion of Nov. 4th enlarged to Nov. 26, 27. Both sides notified.
" 12. Hearing set Nov. 22, 1927, on settlement of record.
" 12. Proof of service of hearing notice and præcipe filed.
" 22. Hearing had before Mr. Littleton on settlement of record. Præcipe re contents of record filed by petitioner approved.

[Certificate to foregoing paper omitted in printing.]

3 Before United States Board of Tax Appeals

Petition

Filed December 16, 1925

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, October 23, 1925.

IT:E:SM-60D
ECW

THE PILLIOD LUMBER COMPANY,
Swanton, Ohio.

SIRS: An audit of your income and profits tax return for the year 1918 has resulted in the determination of a deficiency in tax of $963.34 as shown by bureau letter dated April 11, 1922.

In accordance with the provisions of section 274 of the revenue act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assesment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-60D, ECW. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR, *Commissioner.*
By C. R. NASH, *Assistant to the Commissioner.*

Inclosures:
Statements.
Agreement—Form A

4 STATEMENT

IT:E:SM
ECW-60D

In re: Pilliod Lumber Company, Swanton, Ohio—1918

Deficiency in tax $963.34

After a careful review of your protest dated April 27, 1922, from the findings of the Income Tax Unit in respect to your return for the year 1918, as set forth in bureau letter dated April 11, 1922, you are advised that the bureau holds (1) That the amounts set up on the tax-payer's books by its accountants are estimates and in effect nothing more than appreciation; (2) that the facts upon which the appraisal is based have not been substantiated; (3) that the appraisal is not retrospective; and (4) that the assets in question can not be valued for invested capital purposes at a date subsequent to the date acquired.

Accordingly, the conclusions set forth in the above-mentioned letter are sustained.

United States Board of Tax Appeals

Appeal of the Pilliod Lumber Company, Swanton, Ohio

Docket No. —

1

On October 23, 1925, the Commissioner of Internal Revenue determined that there was a deficiency in respect to the income and excess profits taxes of the above-named petitioner for the year 1918, in the amount of $963.34, and on the same day mailed to the petitioner notice thereof. A copy of the commissioner's letter advising

the petitioner of such determination is appended hereto, marked "Exhibit 1."

2

The commissioner's determination is erroneous in the following respects:

I. The assessment of an additional tax for the year 1918 is barred by the statute of limitations.

5 II. The invested capital of the taxpayer was erroneously reduced by the amount of $25,000.00 asserted by the commissioner to represent good will; whereas, in fact, such amount represented tangible property paid in for the company's capital stock and paid in and earned surplus.

2

On or before March 15, 1919, the taxpayer executed and filed in the office of the collector of internal revenue for the 10th district of Ohio, according to the provisions of law and the regulations of the United States Treasury Department in that regard, its tentative income and excess-profits tax return for the calendar year 1918. On May 31, 1919, under the terms and conditions of the general extension granted by the commissioner for that purpose, the taxpayer also filed in the office of the collector its final income and excess-profits tax return for the calendar year 1918 on the official form provided for that purpose, described as "United States Internal Revenue Service Form 1120." Such final return showed and contained all information relating to the taxpayer's gross income, deductions, net income, invested capital, excess-profits credits, and all other information necessary for the computation of its taxes as required by the directions contained in said Form 1120.

The petitioner has at no time consented in writing or otherwise to the determination or assessment of its income and excess-profits taxes for the year 1918 after five years from the time of filing its tentative and final returns for that year, and such returns were not false and fraudulent with intent to evade tax, nor is the deficiency involved in this case or any part thereof attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234 of the revenue act of 1918.

4

The taxpayer's invested capital for the year 1918 was $43,559.26, as reported in its return, and consisted entirely of cash and tangible property paid in for capital stock and surplus and earned surplus, and included no good will or intangible property whatever.

6 5

Proposition of law

The assessment is barred by the provisions of section 277 (2) of the revenue act of 1924.

(Signed) T. J. PILLIOD,
Treasurer of the Pilliod Lumber Company.

[*Duly sworn to by T. J. Pilliod; jurat omitted in printing.*]

Before United States Board of Tax Appeals

Answer

Filed January 16, 1926

Now comes the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of this taxpayer admits and denies as follows:

7 (1) Admits the material allegations of fact contained in the taxpayer's petition showing jurisdiction of the United States Board of Tax Appeals to determine the correctness of the deficiency of $963.34 determined by the commissioner to be due from this taxpayer.

(2) Denies that the commissioner erred in any manner with respect to the assessment of an additional tax for the year 1918 so far as the statute of limitations is concerned.

(3) Denies that the commissioner erred in reducing the invested capital of this taxpayer by the amount of $25,000, representing alleged good will and appreciation in value of assets.

(4) Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified, or denied.

Propositions of law

(1) This taxpayer's invested capital has been properly computed in accordance with the provisions of section 326 of the revenue act of 1916.

(2) The assessment of deficiency with respect to which this taxpayer has appealed is not barred by the provisions of section 277 of the revenue act of 1924.

Wherefore, it is prayed that this taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of counsel:

THOMAS M. WILKINS,
Special Attorney, Bureau of Internal Revenue.

[Certificate to foregoing paper omitted in printing.]

8 Before U. S. Board of Tax Appeals

Stipulation as to facts

It is hereby stipulated and agreed by and between counsel for petitioner and A. W. Gregg, general counsel, Bureau of Internal Revenue, attorney for the Commissioner of Internal Revenue, that the following facts may be taken as stipulated herein:

1. On or about March 14, 1919, the Pilliod Lumber Company executed and filed with the collector of internal revenue for the tenth district of Ohio a tentative return and estimate of its corporation income and profits taxes for the calendar year ending December 31, 1918, which tentative return is annexed hereto marked "Exhibit 1."

2. On May 31, 1919, the Pilliod Lumber Company filed with the collector of internal revenue of the tenth district of Ohio Form No. 1120, which is annexed hereto and marked "Exhibit 2."

3. On December 8, 1921, an investigation of the tax liability of the Pilliod Lumber Company for the year 1918 was commenced by John T. Gately, an agent of the Internal Revenue Bureau, during the course of which the petitioner's books and records were duly examined by such agent, who completed his investigation on December 13, 1921. The revenue agent made a written report of his investigation to the Commissioner of Internal Revenue, a copy of which report was transmitted to the petitioner and is annexed hereto marked "Exhibit 3."

4. On September 17, 1923, at the request of the Commissioner of Internal Revenue the president and treasurer of the petitioner executed an affidavit which is annexed hereto, marked "Exhibit 4."

5. The amount of nine hundred sixty-three and 34/100 dollars ($963.34) shown due as additional tax by the revenue agent's report, above referred to, is the deficiency involved in this appeal.

6. Petitioner concedes the issue with respect to the determination of its invested capital for the year 1918.

HERBERT W. NAUTS,
Counsel for Petitioner.
A. W. GREGG,
General Counsel, Bureau of Internal Revenue.

[Certificate to foregoing paper omitted in printing.]

9 Before United States Board of Tax Appeals

THE PILLIOD LUMBER CO., PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 10015. Promulgated July 8, 1927

A document filed with the collector of internal revenue on May 31, 1919, in the caption of which appeared in typewriting "The

Pilliod Lumber Co., Swanton, Ohio," but neither signed nor sworn to by anyone, is not such a return as is required by section 239 of the revenue act of 1918, and the filing of such document did not start from that date the running of the statute of limitation of five years.

Herbert W. Nauts, Esq., for the petitioner; Arthur H. Murray, Esq., for the respondent.

Findings of fact and opinion

The commissioner determined a deficiency of $983.34 in respect of the income and profits tax of the petitioner for the calendar year 1918. Petitioner assigns as error that "the assessment of an additional tax for the year 1918 is barred by the statute of limitation," and in its statement of facts in its petition states that it had not at anytime consented in writing, or otherwise, to the determination and assessment of a tax for the year 1918 after five years from the date on which it claims to have filed a return. Petitioner also assigns as error that the commisisoner had failed to include an item of $25,000 in invested capital for the year 1918, but this error was withdrawn at the hearing. The facts are found as stipulated.

Findings of fact

On or about March 14, 1919, the Pilliod Lumber Company executed and filed with the collector of internal revenue for the Tenth District of Ohio a tentative return and estimate of its corporation income and profits taxes for the calendar year ending December 31, 1918.

Said tentative return signed and sworn to by L. N. Pilliod, president, and T. J. Pilliod, treasurer, on March 14, 1919, was entitled "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return" and contains the following:

10 *Collector of Internal Revenue, Toledo, Ohio.*

The amount stated below is remitted herewith in payment of not less than one-fourth of the estimated amount of the income, war-profits, and excess-profits taxes for the year ended December 31, 1918, of the corporation whose name and address appear at the head of this form.

An extension of 45 days in the time allowed for filing a completed return is requested.

It is not possible to file a completed return on or before March 15, 1919, for the following reasons:

Unable to execute and file a complete return.

Estimated amount of tax, $4,000; amount of remittance herewith, $1,000.

On May 31, 1919, the Pilliod Lumber Company filed with the collector of internal revenue of the Tenth District of Ohio Form No. 1120.

The Form 1120 was a document on which was printed "Corporation income and profits tax return for calendar year 1918," and beneath this title there appeared in typewriting the following: The Pilliod Lumber Co., Swanton, Ohio.

This document contained various statements and figures purporting to show gross income, deductions and credits, and net income and invested capital; it also contained various itemized schedules and a statement purporting to show assets and liabilities as of December 31, 1918. This document was neither signed nor sworn to by anyone.

On December 8, 1921, an investigation of the tax liability of the Pilliod Lumber Company for the year 1918 was commenced by John T. Gately, an agent of the Internal Revenue Bureau, during the course of which the petitioner's books and records were duly examined by such agent, who completed his investigation on December 13, 1921. The revenue agent made a written report of his investigation to the Commissioner of Internal Revenue, a copy of which report was transmitted to the petitioner. This report is an audit of the books and records of the petitioner by the revenue agent for the years 1917, 1918, and 1919.

11 On September 17, 1923, at the request of the Commissioner of Internal Revenue, the president and treasurer of the petitioner executed an affidavit which is as follows:

We, the undersigned, hereby affirm that our names should have appeared on our income tax return for 1918, and which to the best of our knowledge and belief is correct. We are unable to furnish duplicate signed report, being unable to locate copy, believing same to have been destroyed with other records.

L. N. PILLIOD, *President.*
T. J. PILLIOD, *Treasurer.*

Sworn to and subscribed before me this 17th day of Sept., 1923.

O. M. BRASLEY,
Notary Public.

On October 23, 1925, the commissioner mailed to petitioner notice of his determination of a deficiency in respect to the income and excess profits tax of petitioner for the year 1918 in the amount of $963.34.

Opinion

LITTLETON: Section 239 of the revenue act of 1918 provides—

"That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer."

The paper filed by the petitioner on March 14, 1919, in the nature of a request for an extension of time for filing a complete return and termed a "tentative return" was certainly not such a return as the statute required. Dallas Brass & Copper Co., 3 B. T. A. 856; Boston Hide & Leather Co., 5 B. T. A. 617; Matteawan Mfg. Co., 4 B. T. A. 953.

Was the document designated form 1120 filed by petitioner on May 31, 1919, the return required by the statute?

The document in question was neither signed nor sworn to by any one. There is no provision of law authorizing the commissioner to waive either the oath or the signatures required by the statute. That the commissioner considers the document filed with the collector on May 31, 1919, at the top of the first page of which was typewritten the name of the petitioner, as not being the return required by the statute is evidenced by the fact that he called the attention of the company to the matter, and a request was made for a sworn statement of the officers touching the subject.

The signatures and oath of the proper parties to a corporate return are not mere empty forms. The purpose is to fix responsibility. Bell Lumber Co., 2 B. T. A. 564; Gutterman Strauss Co., 2 B. T. A. 433. Congress evidently intended when requiring that returns be signed and sworn to that such signatures and oath should have an important bearing upon the determination of the rights of the taxpayer and the Government.

The affidavit made at the request of the commissioner on September 17, 1923, is a sworn acknowledgement of the return as required by law.

Under the circumstances, as shown by the evidence in this case, the board is of the opinion that the Form 1120, filed May 31, 1919, now claimed as a proper income-tax return for the year 1918, was not at that time such a return as the revenue act of 1918 required should be made and filed. Updike v. United States, 8 Fed. (2d) 913.

The petitioner cites and relies on the case of Emmich v. United States, 298 Fed. 5, as sustaining the proposition that a return may be such within the meaning of the statute, although not sworn to.

From a careful reading of that case it will be seen that the defendant was convicted under a count in the indictment charging him with "knowingly, willfully, and feloniously attempting to defeat and evade the tax imposed by the revenue act of 1921" by knowingly, willfully, and feloniously making a return of income far less than the amount of which he was actually the recipient. The gist of the offense was defendant's attempt to evade and defeat the tax imposed, to deceive and defraud the Government by making false and deceptive statements in the return or paper he filed as such. Such attempt or purpose on his part might be effective if the paper was accepted by the collector as true, whether sworn to or not. There was no question but that Emmich signed the return, and there was evidence that it was sworn to.

It is stated in the opinion of the court that " in the first place
13 there is some testimony in the record which would indicate, if believed, that the return was sworn to, and, as has already been explained, it is the province of the jury to determine what weight should be given to the evidence."

The board is of the opinion in this case that the statute of limitation did not begin to run more than five years before October 23, 1925, and hence would not now operate as a bar to the proposed tax assessment.

The board, therefore, determines that there is a deficiency of $963.34 in respect of the tax of this petitioner for the calendar year 1918.

Judgment will be entered for the respondent.

[Certificate to foregoing paper omitted in printing.]

Before U. S. Board of Tax Appeals

Order of redetermination

Pursuant to the board's findings of fact and opinion, promulgated July 8, 1927, it is ordered and decided that, upon redetermination, there is a deficiency for the year 1918 in the amount of $963.34.

(Signed) B. H. LITTLETON,
Member, United States Board of Tax Appeals.

Dated Washington, D. C., July 9, 1927.

[Certificate to foregoing paper omitted in printing.]

14 Before U. S. Board of Tax Appeals

Petition for review

Filed Sept. 7, 1927

The Pilliod Lumber Company, the petitioner herein, respectfully shows that—

It is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Ohio with its principal office and place of business at Swanton, Lucas County, Ohio, and that on or about May 31, 1919, it made to the United States collector of internal revenue for the Tenth District of Ohio at his office in Toledo, Ohio, its corporation, income, and excess-profits tax return for the annual period ending December 31, 1918.

On July 8, 1927, the United States Board of Tax Appeals, upon the petitioner's petition for a redetermination of its corporation income taxes for the year 1918 theretofore determined by the Commissioner of Internal Revenue, rendered a decision in favor of the respondent and against the petitioner, in which decision and the

proceedings had prior thereto certain errors were committed to the prejudice of the petitioner, which are assigned as follows:

I. The board erred in finding that the document described in its finding as "Form No. 1120 filed by the Pilliod Lumber Company in the office of the collector of internal revenue in Toledo, Ohio, on May 31, 1919," was not a corporation income and profits-tax return for the annual period ending December 31, 1918, such as commenced the running of the five-year period, after which the assessment and collection of the tax was barred by the statute of limitations, contrary to the evidence and the law.

II. The board erred in holding that the assessment and collection of an additional amount of corporation income and excess-profits tax from the Pilliod Lumber Company for the annual period ending December 31, 1918, was not barred by the period of limitation provided by law.

III. The board erred in rendering its decision and entering judgment in favor of the respondent and in not rendering its decision and entering judgment in favor of the petitioner.

Wherefore the petitioner prays the board to direct its clerks duly to prepare and send to the United States Circuit Court of Appeals for the Sixth Circuit a transcript of the record and pro-
15 ceedings had in said proceeding, and that the decision and determination of the board be reversed, and for all other and proper relief.

(Signed) HERBERT W. NAUTS,
Counsel for Petitioner.

[*Duly sworn to by T. J. Pilliod; jurat omitted in printing.*]
[Certificate to foregoing paper omitted in printing.]

Before U. S. Board of Tax Appeals

Præcipe for transcript of record

Filed November 4, 1927

To the clerk:

Please transmit and deliver to the clerk of the United States Circuit Court of Appeals for the Sixth Circuit, Federal Building, Cincinnati, Ohio, pursuant to the rules of said court, copies, duly certified as correct, of the following documents in the above-entitled proceeding:

1. The docket entries of proceedings before the board.
2. Pleadings before the board.
16 3. Findings of fact, opinion, and decision of the board.
4. Petition for review.

HERBERT W. NAUTS,
Counsel for Petitioner.

[Certificate to foregoing paper omitted in printing.]
17 [Appearance of counsel omitted in printing.]
[Minute entry of argument and submission Dec. 6, 1928, ...itted in printing.]

18 In United States Circuit Court of Appeals, Sixth Circuit

Decree

Filed June 3, 1929

This cause came on to be heard on a petition to review an order made the 9th day of July, A. D. 1927, in the matter of Pilliod Lumber Company, by the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the said order of the said United States Board of Tax Appeals be, and the same is hereby, reversed and remanded for proper action in accordance with the opinion of this court.

19 [File indorsement omitted.]

No. 5067

In United States Circuit Court of Appeals, Sixth Circuit

THE PILLIOD LUMBER COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition to review an order of the United States Board of Tax Appeals

Opinion filed

June 3, 1929

Before DENISON, MACK, and MOORMAN, Circuit Judges

DENISON, Circuit Judge: This is an appeal from the Board of Tax Appeals under sec. 1224, Tit. 26, U. S. Code. From the findings of fact by the board and the original document, the nature of which is in controversy and which was used by both parties upon the argument upon the theory that it is a part of the record, it appears that the Pilliod Company, an Ohio corporation, undertook to make return and pay its excess-profits, war-profits, and income tax for the year 1918. To this end, in March, 1919, it filed a tentative return, which seems to have been complete in form and which was accompanied by a payment of part of the tax and a request for an extension of time for filing the final return. Within the extended time, and on May 31, it presented to the collector of internal revenue in its district, and he received and filed, the document now in ques-

tion. This consisted of six large pages, constituting Form No. 1120, as furnished by the Internal Revenue Department to corporations for making their income and profits tax returns. Its caption was filled out with the name of the corporation, and all the various schedules, seven in number, which were appropriate, were filled out to show in the customary detail both the war-profits and ex-
20 cess-profits tax and the income tax. It also contained on attached sheets the detailed figures for five of the additional schedules called for by the form. The computations there found indicated a total tax for the year of $3,626.46, and the document was accompanied with the corporation's remittance for $813.23, which, with the previous tentative payment, equalled the amount shown due for the first two quarterly payments. It is to be assumed that the remaining half of the tax, as shown by this return, was duly paid, as nothing appears about it.

In December, 1921, the corporation's books and records for the year 1918 were examined by the agent of the Internal Revenue Bureau—an examination doubtless based upon this document, because his report was filed with the commissioner December 13, 1921, and this "return" bears on its face a notation to that effect. The record further contains a letter from the commissioner, the date of which is not given but which is in reply to the corporation's protest of April 27, 1922, against the findings of the bureau as to the tax for 1918, which findings had been set forth in a letter from the bureau to the corporation on April 11, 1922, and which letter shows that the bureau was insisting upon an additional tax payment for the same reason as later, viz, that the statement of invested capital which had been made by the corporation in this now questioned document was erroneous. The next thing which appears is that shortly before September 17, 1923, the bureau had called the attention of the corporation to the fact, which now appears from inspection of the document, that the blanks at the bottom of the last page, intended for the oath of the president and treasurer, had been left entirely unfilled, and on September 17, in due compliance with the request of the commissioner, the corporation filed what was intended to be and was accepted as the oath of the president and treasurer in due verification of the document so filed in May, 1919. Nothing further was done until October 23, 1925, when the Commissioner made an assessment of a tax deficiency of $963 "as shown by bureau letter dated April 11, 1922." From this deficiency assessment the corporation appealed to the Board of Tax Appeals, and the only question involved is whether the assessment was made within that period of five years after filing the return, to which period the right to assess is limited. (Secs. 277 (a) (2), 278 (a) rev. act of 1924; sec. 250, rev. act of 1918.)

It is to be noted that the law providing for this return (sec. 239, rev. act of 1918) contains no requirement that it should be
21 signed, and the blanks adopted by and used by the Revenue Bureau contemplate no signature as distinguished from the

oath. The law does not require even that there be any signature to the oath, but only that the return be "sworn to."

With reference to this same statute, we held in Emmich v. U. S., 298 Fed. 5, that even though such a document were not in fact sworn to, nevertheless it was a "return" within the scope of the statute punishing false returns; and it is urged with some force that a paper which is a good enough return to justify a conviction of felony because it is a false return is a good enough return to start the statute of limitations running. However, it may be said that a person offering such a paper as a return may not dispute that it is such, while the Government may refuse to accept it as having that character; and we prefer to dispose of this case without dependence upon the Emmich case.

The statutory requirement that the return should be verified is, of course, made to be observed and is of importance; it does not follow that the document, without the oath, is necessarily for all purposes a complete nullity. It would be the duty of the collector to whom such a paper was tendered to refuse to receive it, and the omission would probably be at once corrected. Indeed, it is customary in many places for the taxpayer to take these returns in, present them to the collector, and swear to them before him at the time of the presentation. The purpose of this return is to put before the bureau, in detail, all the facts and figures leading to the computation of the proper tax; and where it appears, as here, that the paper was complete in all details except for the lack of the oath; that it was tendered to the collector and received and filed by him as the statutory return; that it was made the basis of an examination some two and a half years later by the bureau; that it was used by the bureau as the basis of computations and corrections in April, 1922, three years after its filing; and that seemingly no one ever noticed until four and a half years after its filing that no oath was endorsed upon it—under all these circumstances, we think it must be treated by the Government as such a "return," as of its filing date, that the time for making assessment against the taxpayer then began to run.

Our attention is not drawn to any decision directly in point, and we find none. "Return" is a word of general meaning. With reference to a sheriff's return or a return to an appeal, it is common to find returns which are not good under the law but which nevertheless may be amended, as could not be done if they were
22 nullities. This is not a prosecution for perjury, but calls only for a reasonable application of the statute of limitations, one purpose of which is the protection of the taxpayer against claims asserted too long a time after the occurrences upon which they are based. We think a reasonably liberal construction of the word is appropriate to this situation.

Further considerations may be noted: The antithesis of "after the return was filed" of sec. 277 is the "failure to file a return" of sec. 278, which permits assessment "at any time." Where there has

been, as here, such a filing of return that no one for some years discovers any defect, but the bureau and the taxpayer both act as if upon a due return, a congressional intent that a deficiency may be levied ten or twenty years later seems improbable.

Again sec. 239 of the revenue act of 1918 requires three things in the return—gross income, deductions, oath. Each is as essential as the other; yet the omission of items of income or deductions would justify asking an amended return, not ignoring it as nonexistent.

Though the matter is not as clear as we would wish, we think the conclusion of the Board of Tax Appeals must be reversed, and the matter remanded to that board for appropriate action.

23 In United States Circuit Court of Appeals

Dissenting opinion

MOORMAN, C. J. (dissenting): I can not concur. The statute says that a corporation shall make a return stating specifically the items of its gross income and the deductions and credits allowed, and that the return shall be sworn to by the president or other principal officer and by the treasurer or assistant treasurer. Until there has been a substantial compliance by the corporation with these requirements of the statute, there is no return—and hence limitation can not begin to run. The report which appellant filed purported to show income, with deductions and credits, but was not sworn to. The statute just as specifically requires the doing of the latter as the former. If its purpose is to require the corporation to put before the bureau, as accurately and truly as possible, the facts and figures necessary to a correct computation of the proper tax, then it would seem that the verifications under oath are quite as important as the other requirements. Indeed, nothing could be quite so effective of that purpose as the putting of the obligations and hazards of an oath upon the conscience of those whose duty it is to make the report. Congress thought it important enough to require two officers of the corporation to swear to the report.

It was not shown in this case whether the report was mailed to the collector or was handed to him or one of his assistants. If it had been tendered to the collector and he had refused to receive it because it was not sworn to, I should not suppose that any one would contend that it was a return. On the other hand, a report tendered in the prescribed form would have been sufficient, I should think, even if rejected by the collector. The question then turns, as it would seem from the opinion of the court, upon the action of the collector. He, or some one in his office who attended to such matters, filed the report, mistakingly thinking, I have no doubt, that it was properly verified, as I assume the corporation did, too. The statute, as I have said, could only be set in motion by the doing of certain things by the corporation. It failed to do those things;

but it now contends, and the majority opinion in effect holds, that notwithstanding its failure the statute nevertheless became effective because the collector, thinking that the corporation had performed its duty, failed to observe its mistake. I do not think this is sound. It would not be thought to be, I am sure, in the case of a document purporting to be a return which did not pretend to show gross income, with allowable deductions and credits. Having in
24 mind the purpose of such returns, as indicated, I fail to see why there should be any distinction between that case and this.

The State cases that were cited in argument hold that in the absence of compliance with a statute which requires a return to be verified under oath, there is no return. Lawrence v. Janesville, 46 Wis. 364; Newell v. Whitingham, 58 Vt. 341; Narragansett v. Assessors, 17 R. I. 452; and Lee v. Commonwealth, 6 Dana (Ky.) 312. The question was not ruled differently in Emmich v. United States (6 C. C. A.), 298 Fed. 5. In that case the defendant was charged with "knowingly, wilfully, and feloniously attempting to defeat and evade" a tax. The return was set forth merely as the means of the attempt. The point was made that it was not a return, because it was not sworn to. The court held that there was evidence to show that it was sworn to. That holding was entirely sufficient for the purposes of the case. What was further said about the return was in connection with its admissibility in evidence. It should have been admitted because, as appears from the record of that case in this court, it showed on its face that it was sworn to. That of itself was sufficient for its admission.

25 In United States Circuit Court of Appeals

Motion to stay mandate

Filed Jun. 24, 1929

Now comes the Commissioner of Internal Revenue, the petitioner herein, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, and moves the court to enter an order herein staying its mandate for a period of three months from the date of the entry of the judgment herein.

In support of this motion the said Commissioner of Internal Revenue respectfully shows to the court that he is considering the advisability of filing in the Supreme Court within the three months' period provided by statute in that respect a petition for certiorari in this cause; that it is highly probable that such petition for certiorari will be filed; and that he believes it undesirable under such circumstances to have the mandate of this court issue in accordance with the general rules of this court.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

In United States Circuit Court of Appeals

Order staying mandate

Filed Jul. 1, 1929

Order, that motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date, provided that, if within such thirty days the applicant shall file with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record, and brief have been filed and that
26 proof by affidavit of notice thereof under paragraph 3 of Rule 38 of the Supreme Court has been given, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for the mandate shall issue.

27 [Clerk's certificate to foregoing transcript omitted in printing.]

28 Supreme Court of the United States

Order allowing certiorari

Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:]
File No. 34487. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 356. Commissioner of Internal Revenue, petitioner, vs. The Pilliod Lumber Company. Petition for writ of certiorari and exhibit thereto. Filed August 29th, 1929. File No. 34487.

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